In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. [illegible]

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AFL-CIO *et al.*

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the District of Columbia Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, AND ROBERT BYRON, ITS GENERAL PRESIDENT, AND EDWARD F. CARLOUGH, ITS GENERAL SECRETARY-TREASURER, AND ALFRED J. MOSHER, ITS INTERNATIONAL REPRESENTATIVE: LOCAL NO. 70, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, AND W. O. FROST, ITS BUSINESS MANAGER, AND LLOYD KENNEY, ITS RECORDING SECRETARY, AND ROBERT J. KIDNEY, ITS BUSINESS AGENT: LOCAL NO. 65, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, AND CLARENCE DESCH, ITS BUSINESS AGENT, AND J. R. DIETZ, ITS FINANCIAL SECRETARY AND TREASURER, AND ALTON PAGE, ITS BUSINESS AGENT,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For the District of Columbia Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above cause on May 25, 1961.

CITATIONS TO OPINIONS BELOW.

The Intermediate Report of the trial examiner is reported in 127 N. L. R. B., 1635 and is printed in the Joint Appendix in the Court of Appeals. (R. 284.) The Decision and Order of the National Labor Relations Board, hereinafter called the "Board" is reported at 127 N. L. R. B. 1629, and printed in the Joint Appendix (R. 382). The opinion of the court of appeals is not yet reported but is printed in Appendix B hereto, *infra*, p. 17, and reported unofficially at CCH 42 L. C. 16,965, 48 LRRM 2243.

JURISDICTION.

The judgment of the court of appeals was entered on May 25, 1961, Appendix C, *infra*, p. 30. The decree enforcing, as modified, the Order of the Board was entered on June 28, 1961, Appendix D, *infra*, p. 30. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether under Section 8(b)(4) of the National Labor Relations Act as it existed prior to its amendment in 1959 the inducement by a local union of a single employee to refuse to handle or install Burt ventilators constituted inducement or encouragement of a concerted refusal by employees in the course of their employment to handle or install such items in circumstances where:

> (a) the single employee induced or encouraged was a union member and the foreman on a job where Burt ventilators were to be used and the foreman, after being asked by the local union business agent not to install the ventilators, simply ordered the employees working under his supervision to leave the assignment on which the Burt ventilators were being

handled and reassigned them to work at other locations at the same site, without stating any reason for the transfer.

(b) A rank and file union employee working at a job where Burt ventilators were not used was advised by a local union business agent to refuse to handle or install Burt ventilators if he was requested to do so by his employer.

2. Whether the International is responsible for the conduct described above under the agency standards of Section 2(13) of the National Labor Relations Act when it did not participate in, authorize, ratify, or have any knowledge of the same, but advocated generally that ventilators should be fabricated exclusively by members of its affiliated local unions and required its affiliated local unions to protest by legal means the employment of their members to handle or install ventilators that were not so fabricated.

STATUTES INVOLVED.

The statutory provisions principally involved are Sections 2(13) and 8(b)(4)(A) of the National Labor Relations Act, hereinafter called the "Act." (61 Stat. 136, 29 U. S. C. Section 151 *et seq.*) The sections read as follows:

"Sec. 2(13). In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, proc-

> ess, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;"

Also involved are subsections (B) and (C) of Section 8(b)(4) of the Act which are reprinted in Appendix A, hereto, *infra*, pp. 15-16.

STATEMENT OF THE CASE.

The petitioner, Sheet Metal Workers' International Association, AFL-CIO (hereinafter called the International), is an international labor organization whose trade or craft jurisdiction as defined in its constitution covers the fabrication and erection or installation of sheet metal materials of No. 10 gauge or lighter. (R. 254-293, 294.) Petitioners, Local Unions 65 and 70, are local unions affiliated with the International. The Burt Manufacturing Company (hereinafter sometimes called Burt) is a fabricator of sheet metal ventilators, louvres, and other items whose employees are not members of or represented by the International or any of its affiliated local unions and whose products compete in the market with those made by employees represented by sheet metal worker local unions. (R. 289, 290, 299.)

Local Unions 65 and 70, as did virtually all building trade local unions of the International, negotiated a specific type of collective bargaining agreement with sheet metal contractors in their respective local areas. (R. 217, 242.) These contracts, called the Standard Form of Union Agree-

ment, were prepared in blank form by the International and sold to the local unions who wished to order them. Articles I and II of the Standard Fo ... of Union Agreement provide:

"ARTICLE I.

"SECTION 1. This Agreement covers the rates of pay, rules and working conditions of all employees of the employer engaged in the manufacture, fabrication, assembly, handling, erection, installation, dismantling, reconditioning, adjustment, alteration, repairing, and servicing of all ferrous or nonferrous sheet metal work of No. 10 U. S. gauge or its equivalent or lighter gauge, and all other materials used in lieu thereof, all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches and all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

"ARTICLE II.

"SECTION 1. The Employer agrees that none but journeymen sheet metal workers and registered apprentices shall be employed on any work described in Article I." (R. 265, 266.)

These Articles in effect incorporate the jurisdictional claims to sheet metal work contained in the International's Constitution and they have, for many years, been interpreted to mean that sheet metal contractors who are signatories to the Agreement must either do their own fabrication or obtain or purchase fabricated sheet metal materials from a fabricator who also has a contract with a sheet metal workers' local union. (R. 219.) Under the interpretation placed upon Articles I and II, as stated above, sheet metal contractors who were signatory to the Standard Form of Union Agreement were not entitled to install

or handle ventilators made by Burt, since Burt ventilators were fabricated by employees who were members of the United Steelworkers of America, AFL-CIO. (R. 219.)

The International's Constitution required that local union business agents "recognize, protect and be governed by the jurisdictional claims and rights of the Association as set forth in Article I, Section 5 of this Constitution" (R. 259, 260) which claims and rights were incorporated into Articles I and II of the Standard Form of Union Agreement. The International officers from time to time advised local union business agents to require compliance on the part of their local contractors with these provisions, but it consistently cautioned them not to attempt to enforce their local agreements by inducing employees to refuse to install equipment that was already on a job site. (R. 219-220.) The International warned local union business agents that if they induced employees at a job site to refuse to handle goods, they would commit unfair labor practices (R. 221-222), and it had no knowledge of the activities which were found to be unfair labor practices herein until long after they had transpired.

The Unfair Labor Practice Findings.

The case as it now stands concerns two incidents which took place in 1957. In October of 1957, one Melvin Albert, a union member employed as a foreman by Mannen & Roth, a signatory to a Standard Form of Union Agreement contract with Local 65, was approached on the job site of a Cleveland, Ohio, project by Clarence Desch, a business agent of Local 65. Ventilators were being used on the project and Desch asked Albert what make of ventilator was being installed. Albert replied he did not know what ventilators were being used, whereupon he and Desch went to the superintendent's shanty to look at the bill of lading. (R. 118.)

When Desch discovered that Burt ventilators were being used, he asked Albert to stop installing them until he heard from him. No other employees were with Desch and Albert in the superintendent's shanty. Desch then left the job and Albert returned to the roof of the project, where three of his employees were working on the ventilators, and told them "Come on, we are going to go downstairs and work on the ductwork." (R. 118.)

The second incident occurred in May of 1957. Frederick Wetshtein, a union sheet metal employee of Wooster Sheet Metal Company which had a Standard Form of Union Agreement contract with Local 70, was working on a project in Akron, Ohio, when he was visited on the job by Lloyd Kenney, a business agent of Local 70. No ventilators were being installed on the job on which Wetshtein was working. In the course of their conversation, Wetshtein asked Kenney what the situation was on Burt ventilators. Kenney replied, according to Wetshtein that, "He wasn't sure. And, that anything that I wasn't sure about myself just not to handle it, until you find out first." (R. 55.) While at a later date Wetshtein and another employee of the Wooster Sheet Metal Company, Pickett, refused to install Burt ventilators on a different job, the refusal by Pickett to install them was not shown to have been based upon this prior conversation between Kenney and Wetshtein.

PROCEEDINGS BELOW.

The Board found that the actions of the local union business agents in the two instances described above constituted unfair labor practices within the meaning of subsections (A), (B) and (C) of Section 8(b) (4) of the Act. In sustaining the unfair labor practice findings of the Board in these instances, the court below held that a labor organization induced employees to engage in a concerted

refusal to handle products by encouraging or inducing a single employee. This holding is based upon an inference that in both instances the local union business agents making those statements anticipated that the statements would be transmitted to other employees. The court further found that it was immaterial under Section 8(b) (4) whether or not the statements actually were transmitted.

The court also enforced so much of the order of the Board as found that the International was responsible for these unfair labor practices on the theory that the business agents of Locals 65 and 70 were agents of the International when they attempted to prevent the installation of the ventilators on the jobs.

REASONS FOR GRANTING THIS WRIT.

I. The case presents an important question of federal law which should be determined by this Court. This is the question of the proper federal common-law rules of agency which are to be applied in the administration of the Act.

It is clear that international unions are liable and responsible for acts committed in their name or on their behalf by their agents. However, there is uncertainty among the lower courts as to the extent of liability incurred by an international union for acts committed by local unions and their agents when the latter have not been expressly appointed as agents of the international union and do not hold themselves out or represent themselves to be its agents.

The decision in the present case would place an intolerable burden upon international unions in that it tends to hold them liable or accountable for unauthorized acts undertaken by local union officers or agents merely because those acts can be said to be beneficial to the international union or because they were undertaken for the

purpose of carrying out certain broad objectives of the international union. If the decision of the court below on this point is a correct statement of federal common law, international unions will be virtually precluded from continuing to make their traditional claims to work jurisdiction.

II. The decision of the court below conflicts with the decision of this Court in the *Coronado* cases, 259 U. S. 344 (1921) and 268 U. S. 294 (1924), which set forth common-law rules of agency applicable under federal law. In the *Coronado* cases, an extremely violent strike was conducted by District 21 of the United Mine Workers through its own agents and officers, and both the international and District 21 were sued for damages. The President of the international union not only knew of the existence of the strike while it was being conducted, but expressed considerable sympathy for the position of the strikers; and articles and editorials appearing in the United Mine Workers Journal clearly indicated that the international union was generally in favor of the strike action. The Court, nevertheless, held that the international was not responsible for the illegal strike action because it neither authorized, participated in, nor ratified it. The Court rejected arguments of counsel for the mine company to the effect that the international was responsible for the strike action because it had authority to discipline district organizations and to make local strikes its own or because the district in taking strike action was carrying out the international's policies. The *Coronado* principles were expressly recognized as controlling by the Board in *Sunset Line and Twine Company*, 79 N. L. R. B., 1487, 1514-1515 (1948), which case has never been overruled on this point. These principles were also quoted with approval by the court below in *International Ladies Garment Workers Union v. N. L. R. B.*, 237 F. 2d 545, 552 (1956).

On the issue whether inducement of a single employee violates Section 8(b) (4) of the Act, the decision of the court below also conflicts with decisions of this Court in *NLRB v. International Rice Milling Company*, 341 U. S. 665, (1950), and *Local 1976, United Brotherhood of Carpenters, etc., v. NLRB*, 357 U. S. 93 (1958). In the *International Rice Milling Company* case, this Court held that inducement by a labor union of a single employee to refuse to cross a picket line did not constitute inducement of employees within the meaning of Section 8(b) (4) of the Act. In the *Local 1976, United Brotherhood of Carpenters, etc.*, case, this Court again emphasized the fact that in order to constitute a violation of Section 8(b) (4) of the Act the union must induce *employees* to strike against or refuse to handle goods for their employer.

III. The decision of the court below in dealing with the question of the International's responsibility for the unfair labor practices of the local unions is in conflict with the decision of the Ninth Circuit in *NLRB v. Longshoremen's Union*, 283 F. 2d 558 (1960), and its own decision in *United Brotherhood of Carpenters v. NLRB*, 286 F. 2d 533 (1960). In the *Longshoremen's* case the Ninth Circuit held that an international union was not liable for the actions of a local union steward who wrongfully caused the discharge of an employee who had instituted a law suit against the local union. In that case the international and the local union jointly administered the dispatching of employees through a maritime hiring hall. The court pointed out, however, that the unfair labor practices charged emanated not from the procedures at the hiring hall but from actions taken by the steward after the employee had been dispatched to the job.

In the present case, the Section 8(b) (4) unfair labor practices upheld by the court below all occurred in con-

nection with attempts by local union business agents to enforce the provisions of their valid collective bargaining contracts. Thus, here, the International not only did not participate with or assist the local unions in the administration of those contracts but also specifically warned the local union business agents against inducing employee work stoppages at job sites.

In its prior decision in *United Brotherhood of Carpenters v. NLRB*, 286 F. 2d 533 (1960) the court below held, inconsistently with its decision here, that where a local union had adopted certain local work rules, which were not illegal on their face and could have been enforced in a lawful manner, the international union was not responsible for their enforcement in an illegal manner by a local union business agent, notwithstanding the fact that the international union had expressly approved the rules. Articles I and II of the Standard Form of Union Agreement in the present case likewise were not illegal on their face and could have been enforced in a lawful manner as the International both wanted and urged.

The decision of the court below as to inducement of a single employee also conflicts with the decisions of the Seventh Circuit in *Joliet Contractors' Association v. NLRB*, 202 F. 2d 606 (1953), and the Tenth Circuit in *NLRB v. Brewery Workers*, 272 F. 2d 817 (1959). The *Joliet Contractors'* case squarely held that inducement of a single employee to refuse to work does not constitute a violation of Section 8(b) (4) of the Act. A further inference which seems to follow from the court's language in that case is that a work stoppage is not concerted employee action unless the employees involved have knowledge of the reason therefor, and cease work for that reason. The Seventh Circuit was certainly correct in this respect, for "concerted" is defined in *Webster's New Inter-*

national Dictionary, Second Edition (1950) as follows:

> "mutually contrived or planned; agreed on; as, *concerted* schemes or signals." (Emphasis in original.)

Thus the Mannen & Roth employees in the present case were not induced by Albert to take concerted action since they were merely sent from their ventilator assignment to another job by their foreman whom they had to obey; and no concerted action took place when Wetshtein and Pickett each independently refused to install Burt ventilators for the Wooster Sheet Metal Company.

In the *Brewery Workers* case, the Tenth Circuit held that isolated efforts directed at secondary employees to refuse to cross a picket line did not constitute illegal inducement within the meaning of Section 8(b) (4) of the Act because "only efforts to promote concerted action by secondary employees are condemned." 272 F. 2d at page 820. In the present case, as has already been pointed out, in each of the two instances involved only a single employee was induced to take action by the local union business agents.

The court below, in *Amalgamated Meat Cutters v. NLRB*, 237 F. 2d 20 (1956), has rejected this Court's ruling in the *Rice Milling* case to the effect that in order to have a violation of Section 8(b) (4) of the Act, more than one employee must be induced to strike or refuse to perform services. This possibly explains the fact that in this case the court below so readily found the inducement of Albert by Desch and Wetshtein by Kenney to be illegal within the meaning of Section 8(b) (4) of the Act.

The court below relied upon the decision of the Sixth Circuit in *NLRB v. Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 (1957) to support its conclusion that inducement of a single employee may constitute violation of Section 8(b) (4). In *Local 11*, the Sixth Circuit

held that the inducement of a single employee was a violation of Section 8(b) (4) of the Act in circumstances where the employee was a union steward and, as such, could reasonably have been expected to transmit union instructions to his fellow employees. It may be, we submit, that the union steward could be considered a union agent and thus acting on the union's behalf in the transmission of such instructions so that, if he in fact did transmit the instructions to other employees and induced them to engage in a concerted refusal to work for that reason, a violation of Section 8(b) (4) would result. This seems to be what happened in the *Local 11* case.

However, in the present case, even if Albert or Wetshtein could be viewed as union agents after their respective conversations with Desch and Kenney, the undisputed facts show that neither of them transmitted those orders or instructions to other employees and, accordingly, no *concerted* employee refusal to work was induced. If the *Local 11* case, upon which the court below relied, stands for the broader proposition that inducement of a single employee violates Section 8(b) (4) of the Act whenever it may be inferred that he will transmit such inducement to other employees, even in circumstances where he in fact does not, we submit that it is erroneous. Section 8(b) (4) of the Act, prior to its amendment in 1959, did not make it an unfair labor practice for a labor union to *attempt* to induce or encourage employees to engage in a concerted refusal to work; it required actual inducement or encouragement.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Dated: August 17, 1961

APPENDIX A.

THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

(Act of July 5, 1935, C. 372, 49 Stat. 449; as Reenacted by Act of June 23, 1947, C. 120, Title I, C. 120, 61 Stat. 136; and later amended; U. S. C., Title 29, Chapter 7, sub-chapter II, §§ 151-168.)

Section 2 (13), 29 U. S. C. 152 (13)

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 8 (b) (4) (A), 29 U. S. C. 158 (b) (4) (A)

(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

Section 8 (b) (4) (B), 29 U. S. C. 158 (b) (4) (B)

(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of

their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; * * *

Section 8 (b) (4) (C), 29 U. S. C. 158 (b) (4) (C)

(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; * * *

APPENDIX B.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Before EDGERTON, PRETTYMAN and BAZELON, Circuit Judges.

BAZELON, *Circuit Judge*: These petitions to set aside an order of the National Labor Relations Board are brought by the Sheet Metal Workers' International Association, three of its locals, and officers and agents of each. The Board, which asks enforcement of its orders, found violations of §§ 8(b)(4)(A), 8(b)(4)(B), 8(b)(4)(C), and 8(b)(2) of the National Labor Relations Act, as amended, 61 Stat. 141 1947, 29 U. S. C. §§ 158(b)(4)(A), 158(b)(4)(B), 158(b)(4)(C), and 158(b)(2) (1958).[1] These violations relate to an alleged long-standing refusal by petitioners to install the products of Burt Manufacturing Company, a manufacturer of sheet metal ventilators, because Burt's employees are not represented by the Sheet Metal Workers. During the period in question here, Burt was party to a collective agreement with the United Steelworkers, as the certified bargaining representative of its employees.

I. SUBSECTION 8(b)(4)(A).

This subsection[2] "describes and condemns specific union conduct directed to specific objectives. It forbids a

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[1] This case is not affected by the 1959 amendments to the National Labor Relations Act. 73 Stat. 542. See 29 U. S. C. note following § 153 (Supp. II 1959-60).

[2] Subsection 8(b)(4)(A) reads:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted

(Continued on following page)

union to induce employees to strike against or to refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third party. Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person." *Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board*, 357 U. S. 93, 98 (1958). Locals 65 and 70 against which the Board found such violations contend that there was not the requisite inducement of *employees* to engage in *concerted* action.

A. *Local 65—Mannen & Roth Company.*

In October 1957, one Desch, a business agent for Local 65, visited a Mannen & Roth Company job site and questioned Albert, a foreman and a member of Local 65, as to the type of ventilators being installed. Upon discovering they were Burt ventilators, Desch told Albert not to install them until Albert heard from him. Albert immediately sent the three employees who had been installing the ventilators to work elsewhere. The next day a Mannen & Roth supervisor transferred Albert and his crew to another job site. They returned and installed the ventilators after having been so instructed by Mannen & Roth and after Albert received the "go-ahead" from Desch.

(Continued from preceding page)

refusal in the course of their employment to use, manufacture process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: (A) forcing or requiring any employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *."

Albert testified before the trial examiner that he knew he was not supposed to install non-union equipment. The trial examiner found from this testimony that Albert acted as representative of Local 65 rather than of Mannen & Roth in ordering the stoppage of the installation of the ventilators. In upholding the trial examiner, the Board relied upon this testimony and the finding of the trial examiner as well as upon Albert's supposed obligation as a union member.

Since foremen do not fall within the statutory definition of employees,[3] inducing a foreman to stop work does not violate § 8(b)(4)(A). To establish such a violation, there must be a likelihood that the foreman will act as the union's representative or conduit and transmit the inducement to employees. In *Carpenters District Council v. National Labor Relations Board*, 107 U. S. App. D. C. 55, 274 F. 2d 564 (1959), we held that, absent evidence to the contrary, a foreman is presumed to act as representative of his employer rather than of the union of which he is a member. A Board's finding that a foreman acts for the union and contrary to his employer's interests cannot be grounded solely upon the foreman's supposed obligations as a union member. In *United Brotherhood of Carpenters v. National Labor Relations Board*, U. S. App. D. C. , 286 F. 2d 533 (1960), we upheld the Board's determination that the foreman acted as representative of the union where there was evidence that the foreman, on discovering that other employees on the job site were nonunion, promptly quit work and urged several employees to do the same.

The evidence relied upon by the Board in this case is not as persuasive as it was in the *United Brotherhood of*

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[3] National Labor Relations Act, as amended, 61 Stat. 137 (1947), 29 U. S. C. § 152(3) (1958).

Carpenters case. Albert's testimony, however, was sufficient to overcome the presumption that he acted on behalf of his employer. We think it substantial evidence to support the Board's inference that Albert acted on behalf of Local 65 in bringing about the cessation of the installation of Burt ventilators. The Board's order that Local 65 cease and desist from violating § 8(b)(4)(A) will be enforced.

B. *Local 70—Wooster Sheet Metal and Roofing Co.*

In the spring of 1957, one Kenney, a business agent for Local 70, told Wetshtein, an employee of Wooster and a member of the Local, that he was not sure whether members of Local 70 should install Burt ventilators, and that Wetshtein was not to handle them until Kenney found out. The Board found that Kenney's statement to Wetshtein violated § 8(b)(4)(A).

The Local contends that the inducement of a single employee does not violate § 8(b)(4)(A). The Board inferred, however, that because Wetshtein was a union member and because the installation job was usually performed by two or more employees, Kenney's statement was intended to be transmitted to other employees called upon to install the Burt products.

In *National Labor Relations Board v. Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 (6th Cir. 1957) the court upheld the Board's determination that the inducing of a single union steward was sufficient for an 8(b)(4)(A) violation since such an employee could reasonably be expected to transmit union instructions to his fellow employees. Although Wetshtein was not a steward, the Board's determination that he could have reasonably been expected by Kenney to transmit the union's instructions to other employees is also an allowable inference

from the underlying facts in this case. That Kenney's statement did not in fact bring about concerted conduct of Wooster's employees does not preclude an 8(b)(4)(A) violation; it is sufficient that the statement to Wetshtein may be fairly characterized as an effort to bring about such action. *Highway Truck Drivers and Helpers Local 107 v. National Labor Relations Board*, 107 U. S. App. D. C. 1, 273 F. 2d 815 (1959); *National Labor Relations Board v. Denver Bldg. & Const. Trades Council*, 193 F. 2d 421 (10th Cir. 1952). Accordingly, the Board's order finding an 8(b)(4)(A) violation by Local 70 will be enforced.

II. Subsections 8(b)(4)(B) and 8(b)(4)(C).

When the means proscribed by § 8(b)(4) are used for the specific object of "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees * * *" 8(b)(4)(B) is violated. Similarly, a violation of 8(b)(4)(C) occurs when § 8(b)(4) means are used for the object of "forcing or requiring any employer to recognize or bargain with a particular labor organization * * * if another labor organization has been certified as the representative of such employees * * *."

The Board found that an object of Local 65's and Local 70's inducement of Wooster's and Mannen & Roth's employees to refuse to handle Burt products was to secure recognition by Burt of Local 70 upon the expiration of the current bargaining agreement between Burt and the Steelworkers, the certified bargaining representative. It therefore found the Locals' conduct violative of both 8(b)(4)(B) and 8(b)(4)(C).

Petitioners assert three grounds of error: (1) these subsections of the National Labor Relations Act prohibit

only the object of gaining immediate recognition, and petitioners' conduct was at the most an attempt to secure recognition at some remote future time; (2) in finding that an object of petitioners' conduct was to obtain recognition, the Board erred in relying exclusively on events occurring prior to the six-month limitation period of § 10(b); and (3) there was no evidence that petitioners' object was to compel Burt to recognize Local 70 in particular. We discuss these assertions seriatim.

(1) The Board found that petitioners' object of obtaining recognition was directed at a fixed and foreseeable future event, the expiration of the collective agreement between Burt and the Steelworkers. Petitioners contend, however, that only the object of obtaining immediate recognition is proscribed by subsections 8(b)(4)(B) and 8(b)(4)(C). We think not.

Congress' objective in enacting the "secondary boycott" provisions of subsection 8(b)(4)(A) was to protect unoffending employers and others from pressures in controversies not their own, without limiting the right of labor organizations to exert pressure on employers in primary labor disputes. *National Labor Relations Board v. Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 692 (1951). This appears equally to have been the objective in enacting subsection 8(b)(4)(B). Clearly, the damage which may have been caused Mannen & Roth and Wooster by the Locals' conduct and which Congress sought to prevent is in no way lessened by the fact that the Locals' objective was to secure recognition at a foreseeable and fixed future time rather than immediately.

Subsection 8(b)(4)(C) prohibits certain "primary" as well as "secondary" activity. Insofar as "secondary" activity is concerned, we think this subsection is also designed to protect the unoffending employers from the

pressures which the petitioners exerted upon them in petitioners' dispute with Burt. Furthermore, it clearly appears to us that an objective of this subsection is to insure the stability of bargaining relationships through the protection of existing certifications from coercive pressures. Certification does not terminate upon the expiration of a collective agreement, and an employer is still under a duty to bargain with the certified representative of his employees. Whether an object of the conduct in question was to gain recognition immediately or in the foreseeable future, in either case the effect of such conduct would be to undermine the relationship of Burt and the Steelworkers.

We, therefore, hold that the Board properly found subsections 8(b)(4)(B) and 8(b)(4)(C) to proscribe the objective of obtaining future recognition at a fixed and foreseeable time in the circumstances of this case.

(2) The proviso to § 10(b)[4] states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *." As the charge in this case was originally filed on June 5, 1957, the six-month statutory period here involved commenced on December 5, 1956. The Board's finding that an object of petitioners' conduct was to compel Burt to recognize Local 70 was based exclusively on evidence of events antedating December 5, 1956.[5]

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[4] National Labor Relations Act, as amended, 61 Stat. 146 (1947), 29 U. S. C. § 160(b) (1958).

[5] These events were: (1) a letter on December 16, 1955, from Byron, the President of the Sheet Metal Workers' International to the District Director of the Steelworkers, stating that when the Steelworkers' agreement with Burt expired, "with your help we may be able to put them [Burt's employees] into our organization where they belong * * *"; (2) statements of Byron to

(Continued on following page)

although the actual inducements occurred after that date.[6] Petitioners contend that under the Supreme Court's decision in *Local Lodge No. 1424 I. A. M. v. National Labor Relations Board*, 362 U. S. 411 (1960), the Board's finding may not rest solely on such evidence. There, in considering the extent to which events antedating the limitation period may be used to determine whether conduct within the period constitutes an unfair labor practice, the Court laid down the following guide lines:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the

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(Continued from preceding page)

Sawyer, a Burt executive, in August 1956, to the effect that the products boycott would continue until Burt recognized the Sheet Metal Workers; (3) similar statements of Carlough, a Sheet Metal Workers official, to Sawyer in October 1956; and (4) similar statements of Carlough to Steelworkers officials and counsel in November 1956.

[6] The inducement of Local 65's employees on the Mannen & Roth job site occurred in October 1957 after the original charge was filed. The charge was subsequently amended to include this conduct.

> earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. [362 U. S. at 416-17.]

In this case the Board has relied upon events occurring prior to the limitation period to "shed light on the true character" of the objective of petitioners' conduct within the period. Thus, such events are "merely evidentiary." As such, they are admissible in support of charges under 8(b)(4)(B) and (C) and their probative weight is for the Board's determination. These events were not so remote in time as to rob them of probative value. Nor was there any intervening change in circumstances to undermine the Board's inference that the objective manifested by this antecedent conduct continued unchanged. Cf. *National National Labor Relations Board v. Local 50, Bakery and Confectionery Workers Internat'l Union*, 245 F. 2d 542 (2d Cir. 1957). It follows that the Board's finding that an object of the Locals' conduct was to obtain recognition is supported by substantial evidence.

(3) Petitioners finally contend that, even if an object of the Locals' conduct was to obtain recognition for *some* Sheet Metal Workers local, there is no evidence that they sought recognition for *Local 70* in particular. Assuming *arguendo* that such particularization is required by the Act, we think that it reasonably appears from the fact that Local 70 was the only Sheet Metal Workers local whose geographic jurisdiction would have entitled it to represent Burt's employees.

III. Subsection 8(b)(2).

Subsection 8(b)(2) makes it an unfair labor practice for a labor organization or its agent "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3) * * *." Subsection 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." The Board found that Locals 65 and 70, through their inducement of employees to refuse to handle Burt products, and Locals 65, 70 and 98, through their appeals to sheet metal contractors to refuse to install Burt products, attempted to cause Burt not only to recognize Local 70 but also to execute a union security agreement with Local 70 at a time when it would not represent a majority of Burt's employees. Since an employer's execution of a union security agreement with a minority union is violative of subsection 8(a)(3), a majority of the Board held the Locals violated subsection 8(b)(2).

The record does not indicate that any of the petitioner Locals or the International at any time made a demand upon Burt for the execution of a collective agreement containing a union security arrangement. Nor do we think that a demand for such an arrangement necessarily follows from petitioners' attempt to represent Burt's employees upon the expiration of the agreement with the Steelworkers. The Board contends, however, that, since the Standard Form Union Agreement used by many of the Sheet Metal Workers locals contains a union security clause, this indicates that petitioners' object of obtaining recognition from Burt included the objective of obtaining a collective agreement with similar union security provisions.

The Board found that since 1950 the International's constitution has not required locals to use the Standard Form Union Agreement. Although the constitution still requires collective agreements negotiated by the locals to include "certain basic provisions," a union security arrangement is not among them. We do not think that the union security provisions of the Standard Form Union Agreement which the locals are not required to incorporate into their collective agreements is by itself substantial evidence that petitioners sought the execution of such an agreement with Burt at the future time when Burt's agreement with the Steelworkers expired. The Board's order with respect to Locals 65 and 70 will be set aside insofar as the subsection 8(b) (2) charge is concerned. Since the Board found Local 98 violated only this provision, no part of the order will run against Local 98.

IV. The International's Responsibility.

The remaining question is whether the Board properly held the International responsible under the common-law rules of agency for the subsection 8 (b) (4) unfair labor practices of Locals 65 and 70. *International Ladies' Garment Workers' Union v. National Labor Relations Board*, 99 U. S. App. D. C. 64, 237 F. 2d 545 (1956).

The International's constitution asserts "full jurisdiction over the manufacture, fabrication [etc.] * * * of all sheet metal work made of No. Ten (10) U. S., its equivalent or lighter gauge metals * * *." The constitution further requires all collective agreements executed by the locals to contain a provision covering and providing for the protection of the jurisdictional claims. Business agents of the locals are required by the constitutions to "recognize, *protect*, and be governed by the jurisdictional claims and rights of the Association as set forth * * * [in the constitution.]" Emphasis supplied.

The Board found that the jurisdictional claims had been construed and applied by the International and the locals as precluding contracting employers from using sheet metal items fabricated by anyone other than their employees or employees of another employer under contract with the Sheet Metal Workers. The contract of Local 65 with Mannen & Roth and that of Local 70 with Wooster contained provisions so interpreted by the Locals. The contracts, the International's constitution, and the construction given them by the International and the Locals provide substantial evidence in support of the Board's finding that the locals and their business agents were authorized and required by the International not only to include in their collective agreements provisions which they interpreted as prohibiting the installation of non-union goods but also to enforce such provisions. Substantial evidence also supports the Board' finding that the International authorized the enforcement of these provisions with the objective of compelling Burt to recognize Local 70 upon the expiration of Burt's agreement with the Steelworkers.

The International in effect concedes all this but contends that it cannot be held responsible for the Locals' conduct because, as the record affirmatively establishes, it ordered the Locals not to pursue these objectives by means of inducing employees to refuse to handle Burt's products. A principal is not, however, as a matter of law excused from responsibility for his agent's conduct within the general scope of his authority by the fact that the principal has forbidden the use of specific acts by the agent in carrying out the authority. *National Labor Relations Board v. International Longshoremen's and Warehousemen's Union*, 283 F. 2d 558, 565 (9th Cir. 1960); RESTATEMENT (SECOND), AGENCY § 230 (1958).

Our recent decision in the *United Brotherhood of Carpenters* case, *supra*, is not to the contrary. In that case we refused to accept "the Board's implicit assumption that approval of the [locals' trade] rules [by the International] extends to their enforcement by illegal means or for an illegal purpose."[7] There was no finding, as there is here, that the locals and their business agents were authorized by the International to carry out a policy of the International. Consequently we required specific authorization or ratification of the means and objectives of the locals by the International. That is not requisite here. The Board's order will be enforced against the International insofar as enforced against Locals 65 and 70.

Order set aside in part and in all other respects will be enforced.

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[7] U. S. App. D. C. at , 286 F. 2d at 538.

APPENDIX C.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

This case came on to be heard on the record from the National Labor Relations Board, and on petitioners' joint and several petition to review, and on respondent's request for enforcement, of an order of the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Board herein will be set aside to the extent indicated in part III of the opinion of this court and in all other respects will be enforced.

Pursuant to Rule 38 (b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion and judgment of this court.

PER CIRCUIT JUDGE BAZELON.

Dated: May 25, 1961.

APPENDIX D.

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before: EDGERTON, PRETTYMAN and BAZELON,
Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the Sheet Metal Workers' International Association, three of its locals, and officers and agents of each to review and set aside a certain Order issued against them by the National Labor Relations Board on June 30, 1960, and upon the Board's answer and request for enforcement of said Order. The Court heard argument of respective coun-

sel on February 23, 1961, and has considered the briefs and transcript of record filed in this cause. On May 25, 1961, the Court, being fully advised in the premises, handed down its opinion enforcing, as modified, the Board's said Order. In conformity therewith, it is hereby ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the District of Columbia Circuit that the Petitioners, Sheet Metal Workers' International Association, AFL-CIO, its Locals Nos. 70 and 65, and their respective officers, agents, successors and assigns, shall:

1. Cease and desist from engaging in, or inducing or encouraging the employees of any employer other than The Burt Manufacturing Company to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is (A) forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with The Burt Manufacturing Company, or (B) forcing or requiring The Burt Manufacturing Company to recognize or bargain with any of the Petitioners as the representative of its employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9, or (C) forcing or requiring The Burt Manufacturing Company to recognize or bargain with any of the Petitioners as the representative of its employees while the United Steelworkers of America, AFL-CIO, is the certified representative of such employees under the provisions of Section 9.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Post, at all places where notices to members are customarily posted, copies of the appropriate notices attached hereto as an Appendix. Copies of said notice, to be furnished by the Regional Director for the Eighth Region, (Cleveland, Ohio) after being duly signed shall be posted immediately upon receipt thereof and be maintained for a period of sixty (60) consecutive days thereafter in conspicuous places. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material. Each respective Petitioner shall also sign copies of the notice, to be furnished by the aforesaid Regional Director, for posting at the premises of The Burt Manufacturing Company. The International shall also publish a copy of the signed notice in its "Journal."

(b) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree, what steps have been taken to comply herewith.

/s/ HENRY W. EDGERTON,

Judge, United States Court of Appeals for the District of Columbia Circuit.

/s/ E. BARRETT PRETTYMAN,

Judge, United States Court of Appeals for the District of Columbia Circuit.

/s/ DAVID L. BAZELON,

Judge, United States Court of Appeals for the District of Columbia Circuit.

APPENDIX

NOTICE

TO ALL MEMBERS AND TO ALL EMPLOYEES OF THE BURT MANUFACTURING COMPANY

PURSUANT TO

A Decree of the United States Court of Appeals for the District of Columbia Circuit enforcing as modified an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage the employees of any employer other than The Burt Manufacturing Company to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is (A) forcing or requiring any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of or to cease doing business with The Burt Manufacturing Company; (B) forcing or requiring The Burt Manufacturing Company to recognize or bargain with us as the representative of its employees unless certified as the representative of such employees under the provisions of Section 9; or (C) forcing or requiring The Burt Manufacturing Company to recognize or bargain with us as the representative of its employees while United Steelworkers of America, AFL-CIO, is certified as such representative under the provisions of Section 9.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO, AND LOCALS Nos. 70 and 65

(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Dated ..... By .....
(Representative) (Title)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.